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IN THE

Supreme Court of the United States

CHERYL M. CARROLL,

Petitioner,

v.

POSTMASTER GENERAL, JOHN E. POTTER; U.S. POSTAL SERVICE; EUGENE NAVEILLO, in their Professional Capacity and as Individuals,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Summary Judgment standard is that a dismissal may be granted only if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits (if any), show that there is no genuine issue as to any material fact and that the moving party is entitled to judgement as a matter of law. Fed. R. Civ. P. 56.

At this summary judgment stage, the judge's function is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. In making this determination, the Court must examine the facts *in the light most favorable to the non-moving party, and draw all inferences in that party's favor.*

Despite this standard, the District Court and Third Circuit nonetheless held, in this matter, that despite the petitioner's supervisor being an "objectionable person", there was no harassment or discrimination against the plaintiff. This should not be the decision based upon the serious and objectionable behavior of the supervisor.

The questions presented are:

1. Where there is evidence of an "objectionable" defendant and offensive conduct over a period of years, is it the Court's role to dismiss a sexual harassment action, at summary judgment, rather than having a jury rule on the matter?

2. Is a proffering of an adverse action enough to meet a prima facie case for discrimination and/or retaliation?

3. Should clear disparate treatment that does not result in a termination, suspension, demotion, dock in pay, denial of promotion or written reprimand be considered an adverse action if a plaintiff is singled out and treated differently than workers not in a protected class?

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Ms. Cheryl Carroll respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit. The Respondents are John Potter, Postmaster General and the United States Postal Service.

OPINIONS BELOW

The District Court's opinion granting Respondent's motion for summary judgment motion is attached from 5a-21a. This opinion is unpublished. The Third Circuit's opinion affirming the District Court's decision is at 1a-4a. This decision was published at 75 Fed Appx. 874 and 2003 U.S. App. Lexis 19645 (3d Cir. 2003). The Appellate Court's denial of rehearing is at 22a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its opinion on September 23, 2003. The Court of Appeals denied Petitioners request for rehearing on December 10, 2003. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The provisions of Summary Judgement, Title VII and other statutes are otherwise excerpted and referred to herein.

STATEMENT OF THE CASE

1. Petitioner's employment with the United States Postal Service

Cheryl Carroll ("petitioner"), an African American woman, began her employment with the USPS on or about January 3, 1987, as a mail handler at the Kilmer New Jersey Processing and Distribution Center. Petitioner began to serve as an acting supervisor ("204B") on Tour 3, in 1987. While working as a 204B, petitioner would receive a pay increase from a Level 4 to a Level 15. From 1987-88 to the present, Eugene Naviello ("Naviello") was the Tour 3 Superintendent (Manager of Distribution Operations). During petitioner's tenure, Naviello was the head superintendent and all immediate supervisors reported to him.

2. Initial allegations of harassment

a. Unwelcome romantic overtures by Naviello *(7a)*

While serving as an acting supervisor in 1987, petitioner was "asked out" by Naviello on three consecutive evenings. These unwelcome overtures upset petitioner who rejected them in no uncertain terms. Petitioner responded by telling her co-workers and by notifying her union. Naviello became upset and angry at petitioner's reaction. Petitioner then contacted an EEO counselor the very next day as well as Naviello's superior. EEO and union representatives promised to speak with Naviello to address this situation but this was never resolved. Naviello was never disciplined and remained petitioner's supervisor.

Despite these rejections and reports, Naviello continued to harass and ask out petitioner on multiple occasions. Each time, petitioner rejected his advances and appropriately reported him. Petitioner produced witness testimony that corroborated these advances and reports. While petitioner maintains that she reported the actions to EEO, EEO has no record of the complaints.

b. Inappropriate comments and leering *(8a)*

During this same time frame in 1987-1988, Naviello would tell petitioner, "if you want it to stop, you know what you have to do", and he would look down at his private area. Naviello would constantly leer at petitioner by focusing on her various body parts. Petitioner testified, "As a 204B and whatever days I was just mail handler, Level 4, he would come in the work area, find a spot, and just position himself there and just start staring." When petitioner would tell him to stop staring, Naviello would simply smile and state, "if you want it to stop, you know what you have to do." Petitioner testified that the inappropriate leering was constant and even continues to this day.

As to the inappropriate conduct of Naviello, witness Gwen Young stated that he would be "staring" at petitioner in an inappropriate manner. Witness Robert Clark also witnessed Naviello "leering" at petitioner in a "sexual manner." Witnesses testified "Naviello did not treat male workers like that."

c. Completing paperwork, lunch requests and following petitioner around the floor ***(8a)***

Naviello would also complete petitioner's paperwork in an attempt to sign out with her in order to socialize or "talk" with her outside the office. Naviello admitted to this.

In addition, Naviello would follow petitioner around the work floor. Petitioner testified that he would constantly follow her and make her feel uncomfortable. Naviello would attempt to prevent petitioner from having lunch with herself or her friends and try to pressure petitioner to have lunch with him. Petitioner would always reject his requests.

3. The Initial EEO Complaint ***(7a)***

When petitioner met with the EEO counselor, she discussed all incidents previously described. This included the unwelcome requests for dates, leering, paperwork, following and lunch requests. The EEO counselor's response to petitioner was that she would "talk to Mr. Naviello." Petitioner never withdrew this EEO complaint, trusted the counselor and hoped that the behavior would stop as a result of this "talk."

4. Second EEO Complaint, in 1989-90 ***(8a-9a)***

Naviello began to retaliate against petitioner after she went to EEO. Once Naviello learned that petitioner went to EEO, he would not put her on the floor and roster as a 204B for a few months. When petitioner asked Naviello why he was not using her as a 204B, he responded, "if you want it to stop, you know what you have to do", and, again, he would lower his head toward his private area. From late 1988 to the

present Naviello stopped using petitioner as a 204B trainee, because he did not get what he wanted. But Debbie Malecki ("Malecki") and Linda Hendricks ("Hendricks"), the two female coworkers with whom Naviello had affairs, were used as 204B's and were promoted to supervisor positions. Petitioner testified and referred to cases that show that mail handlers were not abolished as 204B's. Petitioner even produced a certification from Joe Soto, union supervisor, that denied defendant's allegation that the 204(b) program was dissolved to employees such as petitioner.

As further retaliation for rejecting his advances and filing an EEO complaint, Naviello began moving petitioner out of her area and forced her to work on other machines while she still had her own work to perform. Naviello would also harass petitioner through the supervisors that reported to him. When the supervisor would force petitioner to move, they would tell her that, "it's not me", and they insinuated that they were put up to it by Naviello. Petitioner would be moved despite the fact that junior workers with less seniority were available. This practice was corroborated by former Supervisor Rose Ledoux. Ms. Ledoux also certified that Naviello favored the male workers in the area. Ms. Ledoux eventually quit supervising due to Naviello's behavior.

Petitioner complained to the Union that Naviello was moving her instead of junior workers. Petitioner's union reps, Vinny Salomine and Jim Keating, would approach Naviello and tell him that he would have to move the junior person. Naviello would simply laugh and tell petitioner, "good union you have, right?" Petitioner also complained to her immediate supervisor and EEO.

Petitioner met with an EEO counselor and told her about the recent incidents along with the entire history of her problems of harassment by Naviello. Petitioner would always tell the EEO counselor that the reason for this treatment was because she rejected his romantic advances. Petitioner filled out the pre-complaint paperwork before meeting with the counselor. Once again the counselor told petitioner that she would talk to Naviello. Naviello refused to meet with the EEO counselor, yet the EEO complaint was resolved in the favor of Naviello. Petitioner and EEO do not have copies of this complaint.

5. 1993 Change in work hours *(9a)*

In 1993, in a further act of retaliation, discrimination and harassment, Naviello directed petitioner's supervisors to move petitioner from her position. Naviello directed Dennis Hurley ("Hurley"), petitioner's immediate supervisor in 1993, to move her to other positions and hours despite the fact that there were junior people that were not moved. Petitioner was working the 3:00 p.m. to 11:30 p.m. shift, but Hurley switched petitioner's hours to 7:55 p.m. to 4:55 a.m.

Petitioner complained that the other workers, Fred Henninger ("Henninger") and Pat Kondrk ("Kondrk"), who were junior to her, were not moved first as per the union contract. Hurley told petitioner that he was simply, "doing what he was told", per Naviello's instructions. When petitioner continued to complain, Hurley put his finger in petitioner's face and told her, "if you don't come in when I tell you to come in, I'll put you on the platform unloading trailers." This change of hours disrupted petitioner's life since she had a young son at home. Petitioner's co-worker, Gwen

Young, corroborated the switch in hours while junior Caucasians kept the same hours. Clark testified that petitioner's problems with Naviello were because he liked her. This was wrong because it was not by seniority. Petitioner and Al Cassell ("Cassell") were the only ones switched; they were African American; the Caucasians were not switched. After her hours were changed, petitioner filed a complaint with the union and EEO.

Hurley even confirms the procedure for changing hours based upon seniority. He recalls an assignment change for petitioner, on April 27, 1993, however, he does not recall the specifics. Naviello testified that he was aware of the changes and gave his approval. Naviello also testified that it would "surprise" him if the senior employee was moved before the junior employee. He did concede that it was *a "coincidence"* that the only two employees moved were African American.

When petitioner complained to her union rep, Solomine, he refused to file a grievance and simply told petitioner to file an EEO complaint. Solomine's integrity as a union leader has been questioned by petitioner and other co-workers. Kondrk also states that Solomine never stood up for the workers and was attempting to obtain a management position. James Keating, another union shop-steward on tour 1, filed a grievance for petitioner since Solomine always refused. Mr. Keating states that Hurley admitted to him that he was only doing "what he was told" by Naviello.

Management previously went to Henninger and Kondrk, who were junior to petitioner, with the same time-frame and gave them their choice of hours. Petitioner was never given that opportunity. And Cassell, the other African American

worker, had his hours changed as well despite the fact that he was senior to the others. Henninger and Kondrk, who were both Caucasians and junior to petitioner and Cassell, did not have to change hours. Soto submitted a certification outlining the correct procedure which was violated. Petitioner was not switched back to her original hours until a year and a half later and was not given out of schedule pay as per the contract.

6. EEO Case No. 1A089166693 ***(9a-10a)***

Petitioner reported this wrongful action to the Postmaster General's office the next day. Petitioner filed an EEO action and had Ms. Rivers as a counselor at this time. Petitioner's EEO complaint alleged race and gender discrimination, harassment and retaliation. Petitioner also told the counselor about the continuing harassment based on the sexual overtures from Naviello.

Petitioner and EEO do not have copies of the file. Petitioner received a call from the EEO counselor scheduling a meeting right after she gave birth to her baby. Petitioner advised Ms. Rivers that she could not attend this meeting due to the birth. Ms. Rivers stated that if petitioner couldn't make it that day, the case would be closed. Ms. Rivers sent petitioner a letter erroneously stating that petitioner requested the case to be closed. Petitioner vehemently denies that she requested this. Petitioner maintains that the file was closed against her will by EEO when she was unable to attend the meeting due to health reasons.

While the District Court states that the first EEO contact was in 1993 based upon the tracking system, it should be noted that a prior EEO case 1N00152592 was opened in 1992.

7. 1995 - Stealing petitioner's supplies and moving petitioner, creating an uneven mail flow *(10a-11a)*

There was also the problem of a fellow employee stealing petitioner's supplies and putting extra work on her multiple work trays. When petitioner confronted the employee, Roberto, about this situation, he used profanity at her. Naviello knew about this offensive behavior but would just laugh at petitioner and not do anything to stop it. As to Roberto and Pat (Caucasions), they worked on a machine together while petitioner worked alone. Roberto would just stand there and not start up his machine. He was seen taking petitioner's supplies and nothing was done. Many times petitioner was told to help them. They never reciprocated. It degenerated to the point where petitioner's husband went to the office to confront the situation. It was only through petitioner's husband coming to the workplace that the "supply issue" was addressed by management. Petitioner met in an office with her husband and Naviello where it was demanded that the situation be remedied. Tom Antel, a tour supervisor, witnessed the acts and confronted Roberto. Naviello admitted that they caught Roberto "red handed" but failed to write him up. Naviello testified that despite the serious infraction, he believed that Roberto "would not do it again." The Court states in its opinion that "a co-worker took her supplies and was reprimanded." If the disputed facts of the matter were, in fact, examined in a light most favorable to petitioner, there is no way that the Court could conclude that, when petitioner clearly states that Roberto faced no disciplinary charges. Naviello himself admitted that nothing was done to Roberto.

In 1995, petitioner's immediate supervisor was Richard Johnson ("Johnson"). During this time, Naviello instructed Johnson to put all mail on petitioner's LSM machine and

allowed other Caucasian employees stand around. Johnson told petitioner that he was instructed by Naviello to leave the mail until petitioner came in. When petitioner complained to Naviello he again repeated to her, "if you want it to stop, you know what you have to do." Gwen Young, a co-worker, corroborated that excess mail was put on petitioner's machine while the other handlers would stand idle. Naviello also instructed petitioner to help on the OCR and assist other areas despite the fact that she had her own work and other junior workers were not moved. While petitioner was gone, they would put Kondrk behind petitioner's machine. Petitioner reported this action to the union immediately. This issue went on for over a year and was never resolved.

Naviello testified that petitioner was moved due to her "not getting along with another employee." Naviello admits that he had the power to stop the move, but failed to do so. Petitioner disputes the fact that there was any personal problems with Kondrk. Petitioner called Larry Adams, Union President, and was told that Naviello deemed her a "trouble maker that nobody wanted to work with." Petitioner disputed this as well as any notion that she took any unauthorized breaks. This issue went on for over a year and was never resolved.

In fact, Kondrk certified that any "altercation" between her and petitioner was untrue. Kondrk went on to state that she never yelled or argued with petitioner despite management's assertions. Kondrk also states that she does not know why management would make up a story about her not getting along with petitioner as a basis for petitioner's move. Kondrk makes it clear that she does not appreciate being management's scapegoat.

Kondrk and Henninger, Caucasian and junior to petitioner, were not moved despite the union Agreement. Petitioner would be forced to do all the work while Kondrk, Henninger and Naviello chatted. Malecki was also a Caucasian LSM worker who was favored by Naviello; he would leave the building with her for long stretches of time.

As to Malecki, she and Naviello had an intimate personal relationship; she is now a supervisor. Ms. Young has witnessed them "rubbing each other's arm" and "leaving the building with each other" for two hours at a time. Young states, "it wasn't professional." Then Malecki was promoted and also received a year off when she gave birth. She received preferential treatment and was seen taking supervisor's lunch orders and watching television, all because of her relationship with Naviello. Hendricks was promoted to a supervisor; they received favorable treatment (from Naviello). Naviello continued the inappropriate comments to petitioner during that time period.

When petitioner contacted EEO as a result of these actions, she spoke to an individual who mailed her the pre-complaint forms. Petitioner eventually received the paperwork and filled out the report regarding the uneven flow of mail and being moved to a heavier LSM. Petitioner maintains that she filed all the paperwork in a timely manner and walked it over to the office. When petitioner filed a formal complaint she did not allege all of the acts above but rather focused on the recent events of an uneven work load and being moved from her LSM. However, petitioner filed a pre-complaint form which clearly states that the harassment was "ongoing since 1989." Johnson wrote a statement for the EEO that he admitted was untrue to petitioner. When petitioner asked Johnson who forced him to write the

statement, he responded that *it was Naviello*. Petitioner filed a formal EEO complaint on November 3, 1995. The Complaint was denied because there was no loss of pay. EEO failed to address the issue of discrimination.

Petitioner appealed this EEO decision. EEO then reopened the case. As a result of the appeal, petitioner had a meeting with Pilar Zambrano (EEO), Solomine (union rep.), Johnson and Naviello. During this meeting, Pilar continually pressured petitioner to close the case. Johnson stated at the meeting that he would try to distribute the mail evenly and not move petitioner. Afterwards, Pilar spoke with petitioner and told her if she would withdraw the case, it would remain active. As a result of this misrepresentation, petitioner signed a withdrawal form. Soon after the case was closed, the incidents began occurring again. Then, when petitioner called Pilar, she was told that the matter was closed. Petitioner confronted Pilar on her misrepresentation but could not reopen the case.

8. August 26, 1998 - Out of schedule dispute *(11a-12a)*

In August of 1998, Mark Pavilcheck ("Pavilcheck") was petitioner's immediate supervisor with Tony Brullo ("Brullo") subbing for him when Pavilcheck was out. During this time frame, petitioner was working out of schedule from 4:00 p.m. to 12:30 a.m. vs. 3:00 p.m. to 11:30 p.m.. This change in schedule was granted verbally by Pavilcheck months ago as a result of petitioner giving birth to her baby.

When Pavilcheck was out of the office for a few days, Brullo was in charge of petitioner's area. Brullo told petitioner that she was to return to her previous hours beginning the next morning. When petitioner questioned the

reason for the switch, Brullo told her that it was ordered by Naviello. Petitioner attempted to explain the situation regarding her baby's feeding schedule but Brullo deferred to Naviello despite knowing that petitioner had permission for the change in hours.

Petitioner confronted Naviello over this change in schedule by attempting to explain that it was verbally granted by Pavilcheck. Petitioner testified that Naviello then screamed at her. He put his finger in petitioner's face and said, "I'm in charge of you now, Cheryl, and you better do what I say. Did you hear what I said? You better do what I say." When petitioner asked Naviello why she was being singled out, he responded that he was only concerned with her. Robert Clark observed this entire exchange. Petitioner was singled out while many other people worked out of schedule with or without verbal approval from Pavilcheck: Ruben Rodriguez, Ray Warden, Kevin Mannix, Robin Ramos, Karen Myers, Glen McDeedy and Viola Spurill.

Clark corroborates that a change in schedule procedure is by seniority. However, in 1996 petitioner received approval from Mark Pavelchek, Supervisor, because of medical reasons. This was to work out of schedule. Many people, six or seven, were working out of schedule at that time. Naviello admitted that petitioner probably had consent from Pavilcheck. He also admitted that this had happened before. Petitioner offered witness statements that certified that she has both witnessed co-workers working out of schedule and worked out of schedule herself without filling out the "mandatory" form 3189. But petitioner was denied and mentally abused as a result.

Naviello further stated that Viola Spurill ("Spurill") reported to him that petitioner was working out of schedule. In fact, Naviello states that if Spurill did not come up to him, the entire incident never would have happened. This is directly contrary to Spurill who denies that she ever confronted Naviello. Petitioner was the only African American worker working out of schedule. While Ms. Spurill was African American, she was falsely used by Naviello to single out petitioner, another African American. Petitioner disputes the assertion that Naviello merely wanted her to fill out a 3189 form. In fact, Naviello never mentioned such a form to petitioner at all. Naviello admits that he does not remember giving petitioner a 3189 form to complete.

It is undisputed that petitioner contacted EEO the next day. Petitioner also called Naviello's boss, plant manager Frank Tulino ("Tulino"). When petitioner spoke to Tulino, he apologized for Naviello's behavior and begged petitioner to not tell her husband. Petitioner eventually met with Tulino and told him the entire history between her and Naviello. This included how Naviello sexually harassed her, retaliated against her due to prior EEO complaints, discriminated against her based on her race, gender and as an African American woman. Petitioner reiterated that she wanted Naviello terminated or transferred based on his conduct.

Tulino apologized for Naviello's behavior and told petitioner that he was a poor representative of management. She then explained the medical reasons for her change in schedule and the circumstances surrounding her change in hours. Tulino told her that Naviello "should have never asked you why you are on a change of schedule. If the change was

approved by the immediate supervisor, that should have been good enough for Gino." He said,

> In some post offices all paperwork has to be filled out. You can't have a change of schedule, you can't have a day off unless the necessary paperwork is filled out. But if that's Mark's procedure, if it works down here with Mark, if everybody is paid, I have no problem with that.

Tulino went on to say that he believed petitioner and offered her a job as a 204B. This 204B offer was offered years after the Postal Service and the District Court stated that petitioner could be used as a 204B.

But the reality is that soon thereafter, there was a meeting with Tulino, Naviello, Palvelchek, William Donohue (union representative), Ardie Endick (EAP counselor) and petitioner. Petitioner had already contacted EEO before this meeting so it was purely an internal affair. At the meeting, Endick said that Naviello and petitioner had to find a way to get along. Petitioner told the group that Naviello treats her poorly because she is an African American woman. Petitioner then rehashed the entire history that she had with defendant including the unwelcome romantic and sexual overtures by Naviello. Mr. Donohue stated that if Pavalcheck's procedure is verbal approvals, Naviello had no business singling petitioner out. He also stated that petitioner's work was exemplary so Naviello's problems with petitioner must be personal and she was being targeted. At the end of the meeting, Tulino reiterated that he believed petitioner and the problem Naviello had with her is obviously not work related. Naviello finally admitted to yelling at petitioner and pounding on the desk. Tulino ended the meeting by stating that Naviello

should have waited for Pavilcheck to come back. No resolution came as a result of this meeting. In fact, Tulino tried to deny that the meeting even took place but Donahue has corroborated that it in fact happened.

Petitioner contacted an EEO counselor on August 27, 1998, the day after the incident. Petitioner filed a pre-complaint that stated, "I have about three prior claims against Eugene Naviello through the years of service." Petitioner also requested a transfer to Tour 2 as a result of Naviello's discrimination and harassment. In the Counselor's Inquiry Report the basis for discrimination was: Race, Color, Sex and Retaliation. There was no box for sexual harassment, so petitioner checked the closest possible box that applied due to her status as a woman.

On or about January 7, 1999, petitioner filed a formal EEO complaint of discrimination, alleging discrimination based upon her race and sex on August 26, 1998, as well as retaliation for her prior EEO activity. In an attachment to the Complaint, petitioner states, "This is about the 4th EEO case I have had with Mr. Naviello since my employment in 1987."

A meeting was called as part of the EEO redress program. Nothing came out of this meeting as well. The Complaint was dismissed for failing to state a claim for discrimination or harassment (as it was conveyed to petitioner that a supervisor raising his voice and banging on a desk could not be an admission). Petitioner appealed this decision but the appeal was denied on September 2, 1999. Petitioner filed this lawsuit on December 2, 1999.

9. The harassment continued after petitioner filed lawsuit *(13a)*

Naviello's harassment continued even after petitioner filed this lawsuit. Naviello still is the MDO of petitioner's tour and is in her daily presence.

Petitioner was ordered to come in at her regular time by Naviello despite the fact that other workers are allowed to come in early. There was also problems with supervisors, Mr. Pacheco, who placed her on Tour 2 against her wishes. And then, a problem with Steve Kocylowski. Petitioner was called to his area by workers to try to assist them as the conditions were bad. Kocylowski told petitioner to get out of his area. Petitioner left. Kocylowski then accused petitioner of cursing at him, which was not true as corroborated by a witness. When it got to Naviello, he demanded that petitioner apologize, and backed Kocylowski. Petitioner was merely pointing out an "unsafe condition on the work floor." Though petitioner filed a grievance that resulted in the determination that she never used profanity, there was never a retraction.

Finally, petitioner was subjected to an explicit sexual act where Naviello "slid" against the wall in a suggestive manner, put his arm upon the wall and blocked petitioner's way. The next day Naviello was sliding up and down the wall and graphically posing in front of petitioner. Petitioner found these gyrations "disgusting." A witness to this act, Robert Clark, deemed that these poses were sexual in nature and vindictive. Petitioner told Naviello's boss, but once again nothing happened.

10. Subsequent court action

The District Court dismissed the Complaint on a motion for summary judgment from the respondent on December 9, 2002. The petitioner timely appealed the matter to the Third Circuit Court of Appeals. The Third Circuit affirmed the District Court's ruling on September 23, 2003. The petitioner timely filed an application for a rehearing. The petition for rehearing was denied on December 10, 2003. This petition for a Writ of Certiorari followed.

REASONS FOR GRANTING THE PETITION

This petition should be granted for three reasons. First, the Third Circuit's affirmation (and endorsing the lower Court's "able judge") of the District Court's erroneous decision sets a dangerous precedent against a plaintiff alleging harassment and discrimination at the stage of summary judgment. It is clear that based upon these lower rulings that a plaintiff is forced to prevail at two separate trials: one for the judge at summary judgment and second to a jury at trial. This overburdens a plaintiff and, in effect, requires her to prevail twice in order for justice to be granted. This was never the intent of the summary judgment standard. Review should be granted to prevent this irreversible harm.

Second, the Third Circuit's decision conflicts with the holdings of this Court and other Circuits. It espouses the legal principal that a plaintiff alleging multiple incidents of discrimination and harassment over a long period of time does not give rise to sexual harassment and/or discrimination unless it rises to the threshold level for each individual judge.

Finally, the Third Circuit's decision conflicts with the holdings of this Court and other circuits in forcing plaintiff to prove an adverse action with more than mere testimony and invokes the dangerous precedent that an employee does not suffer an adverse action even if singled out and treated differently than workers not in a protected class.

I. The Decision Below Sets a National Rule Meriting the Court's Immediate Intervention Because it Will Place an Additional Burden onto a Plaintiff at Summary Judgement and it Conflicts with the Holdings of this Court and Other Circuits.

Summary judgement may be granted only if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits (if any), show that there is no genuine issue as to any material fact and that the moving party is entitled to judgement as a matter of law. Fed. R. Civ. P. 56. "[A]t the summary judgement stage, the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). In making this determination, the Court must examine the facts in the light most favorable to the non-moving party, and draw all inferences in that party's favor. *Bray v. Marriott Hotels*, 110 F.3d 986, 989 (3d Cir. 1997); *Torre v. Casio*, 42 F.3d 825 830 (3d Cir. 1994); *Armbruster v. Unisys Corp.*, 32 F.3d 768, 777 (3d Cir. 1994).

More importantly, in Title VII cases, impermissible discriminatory intent and proof of disparate treatment are often difficult to establish, thus courts must view summary judgment with special caution. *Swingle v. Henderson*, 142 F. Supp. 2d 625, 631 (DNJ 2001). Only meritless sexual

harassment claims should be granted summary judgment in the defendant's favor. *Id.* at 631.

Title VII provides that an employer may not discriminate against any individual because of such individual's sex. 42 U.S.C. § 2000e-2(a)(1). The Supreme Court has determined that the work environment is a "term, condition, or privilege of employment," and as such, a cause of action exists under Title VII for persons forced to work in an environment where sexual harassment has created a hostile or abusive environment. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 73 (1986). The requirements for establishing a claim for sexually hostile work environment are: (1) the employee suffered intentional discrimination because of her sex; (2) the discrimination was pervasive and regular; (3) the discrimination detrimentally affected the plaintiff; and (4) the discrimination would detrimentally affect a reasonable person of the same sex in that position. *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 (3d Cir. 1990).

Plaintiff proffers a consistent pattern of harassing events that continued over the years due to her rejection of Naviello's romantic advances. The constant statement by Naviello of, "if you want it to stop you know what you have to do", *while glancing at his private area*, certainly has offensive sexual connotations, and has greatly compromised the plaintiff. Plaintiff alleges that the statement, combined with the glances to his private area (this fact coincidentally left out by defendant), certainly meets the threshold. This action is key to the pattern in that plaintiff testified that after each incident of harassment, Naviello would say this to her accompanied by his offensive gestures.

Petitioner testified that the repeated romantic overtures by Naviello continued despite her clear rejections. When petitioner reported Naviello, he continued the harassment by the litany of acts interfering with petitioner's employment over the years. Naviello continued to leer at petitioner an make her feel singled out. The sexual comments by Naviello continued as well as actions, culminating in his gyrations against the wall while staring at petitioner. While the District Court considered the allegation of sexual gyrations against the wall "vague", it must be noted that the sexual nature of this act was witnessed by another employee who deemed it offensive. The Third Circuit also corroborates Naviello's conduct as "objectionable." This should be enough to meet the plaintiff friendly standard of summary judgment. The District Court is holding the petitioner to a higher standard as if it were a trial.

A jury is best suited to evaluate severe and pervasive acts. *Gallagher v. Delaney*, 139 F.3d 338 (2d Cir. 1998). Few comments would not be considered so severe or pervasive if they were the only ones alleged over her years of employment, however assertions that the comments and actions were "common, ongoing and continual" establishes that the statements were more pervasive than ones that other courts find insufficient to create a hostile work environment. *Abeita v. Trans America Mailings, Inc.*, 159 F.3d 246, 252 (6th Cir. 1998). The petitioner is only required to testify generally to the frequency of the harassment in order to satisfy the "regular" prong. *Torres v. Pisano*, 116 F.3d 625 (2d Cir. 1997). Petitioner has proffered testimony using the descriptions: "continuous", "daily", "always", "often", "repeatedly" as well as general dates.

The Court seemingly trivializes the acts when it states that petitioner worked for the Post Office for many years and points to "only a handful of incidents" to support her claims. Over this ten year period, petitioner has endured:

> unwanted romantic overtures, sexual threats/ propositions, rejection of advancement, moved while junior employees had more rights, changed work hours, stealing of her supplies, burdened with excess tasks, moved out of schedule, singled out as only individual disciplined, constant leering and following around. The incidents continued after filing the lawsuit as well culminating with sexual gyrations toward petitioner.

These are not "vague incidents" as characterized by the District Court but rather actions and behavior that clearly went beyond the scope of any supervisory duty. Petitioner provides additional witness testimony that support the fact that Naviello's actions were not merely work related.

At summary judgment, these incidents should be examined in a light most favorable to petitioner. It is not far fetched that a jury would see these actions as a pattern of hostility against petitioner. Each incident that petitioner endured lasted months and sometimes years. The only true lapse in harassment was when petitioner was on maternity leave. When the incidents are examined within the context of an event or two per year, with the only constant factor being Naviello, it is feasible that there was a distinct pattern. Petitioner endured over ten incidents within a ten year period, each incident carrying on for months at a time.

The District Court, as well as the Third Circuit, questions the frequency of the acts based upon the lack of specific dates. The Court goes so far as to belittle petitioner's testimony that the acts happened "all the time" and "constantly". While the lack of specific dates may hurt petitioner's credibility at trial, the testimony that the acts happened "all the time" and "constantly" is enough to meet the summary judgment standard at this time. Petitioner did not simply brush off the acts by vaguely characterizing them. In fact, petitioner testified throughout her deposition that many of the acts happened "continually", "constantly" and "all the time". Witness Gwen Young even testified that she witnessed the specific, inappropriate leering "a couple of times". How many times does petitioner need to endure to have it considered a pattern? This is a question for a jury.

Along with petitioner's specific testimony, it is clear that the acts alleged were "regular." If there is an issue of fact as to whether the petitioner found the conduct undesirable and offensive, it is a question for trial. *Hanson v. City of Dundee*, 682 F 2d 897, 903 (11th Cir. 1982). A plaintiff may establish a continuing violation not only by demonstrating an employer wide policy or practice, but also by demonstrating a series of related acts against a single individual. *Green v. Los Angeles County Superintendent of Schools*, 883 F.2d 1472, 1480 (9th Cir. 1989).

As to the Third Circuits critical comments regarding the timing of the incidents, the courts have ruled that the statute of limitations may be tolled and the administrative remedies do not need to be exhausted if a plaintiff alleges discrimination under the Doctrine of Continuing Violations. *Haithcock v. Frank*, 958 F.2d 671 (6th Cir. 1992). If the acts the complainant alleges in her complaint are, on their

face, like or reasonably related to the allegations in her formal administrative complaint, she has exhausted her administrative remedies. *Id.* at 677. A plaintiff may prove continuing discrimination without producing system wide evidence, if one has produced evidence that the "offending practice" was an ongoing one. *Miller v. Beneficial Management*, 977 F.2d 834, 845 (1992). It is obvious, herein, that the offenses were continuing.

It is clear that the petitioner has alleged multiple acts of serious harassment over the course of her employment that has a significant detrimental affect on her or anyone else in her position. These cannot be dismissed by the District Court as "offhand remarks" or "merely offensive" and therefore not actionable. These actions should be reviewed and weighed by a jury. If the jury determined that the acts were not sufficient than petitioner would have received proper due process. The actions of the District Court and ratified by the Third Circuit are not isolated. It is becoming more frequent that plaintiff's are required to prove their entire case not only at trial but at summary judgment as well. The case law has determined that most contradicted issues dealing with sexual harassment should be determined by a jury. The problem is that cases such as the one at bar have the standard set by the Court and if it is not met, the jury will never rule on these vital issues. It is petitioner's argument that the sexual harassment test, as currently applied, allows the Court to function as a determiner of fact as well as law, thus performing a dual role. The plaintiff should only need to prove that she suffered several events of harassment over the years which affected her (and any other reasonable person) in a negative manner. By allowing the Court to unilaterally weigh the frequency and severity prongs of the test for harassment, many plaintiffs are not able to have their cases

proceed to trial due to the unfairly high standards set by the Courts. By allowing this matter be dismissed the Court sets a dangerous precedent against a plaintiff's alleging harassment and discrimination at the stage of summary judgment. It is clear that based upon these lower rulings a plaintiff is forced to prevail at two separate trials: one for the judge at summary judgment and second to a jury at trial. This burdens a plaintiff and in effect makes her win twice in order to be granted justice. This was never the intent of the summary judgment standard. Review should be granted to prevent this irreversible harm.

II. The Third Circuit's Decision Conflicts with Holdings of this Court and Other Circuits in Forcing to Prove an Adverse Action with More Than Mere Testimony and Invokes the Dangerous Precedent that an Employee Does not Suffer an Adverse Action Even if Singled Out and Treated Differently Than Workers Outside the Protected Class.

The District Court, with affirmation by the Third Circuit, dismissed petitioner's claims for discrimination and retaliation based upon the lack of an "adverse action." This ruling needs to be examined for two reasons. First, petitioner provides testimony and proof that she was denied promotional opportunities as a 204B which was discounted by the Courts. Secondly, the term "adverse action" as currently defined, provides no remedy for countless people in a protected class that do not have their "terms of employment" affected but are treated in a clear substandard and offensive manner than others outside the protected class.

In petitioner's claims for discrimination and retaliation, the main reason for its denial was that none of the conduct committed by Naviello or management resulted in any significant changes in "job benefits, privileges, conditions or terms."

A. The Petitioner Provides Testimony and Proof that she was Denied Promotional Opportunity.

The District Court states that plaintiff continued to work as a 204B after the initial overture and that the 204B practice was abandoned in the early 1990's. Plaintiff disputes this as she filed a complaint and complained about the loss of her 204B rights as early as 1987 and after. In addition, petitioner maintains that the 204B program still exists today and was even considered a material fact in other cases where an employee was denied 204B training as late as 1996. *Chiniewicz v. Henderson*, 202 F. Supp. 2d 332, 2002 U.S. Dist. LEXIS 7486. If petitioner was denied 204B work at any time it was an adverse action against her because it gave her less pay and denied promotional opportunity.

The actions of Naviello resulted in her losing her 204B supervisory status. Supra. This loss of this status is a significant adverse action to petitioner's career as well as her pay. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). *Ellerth* states that a failure to promote as a significant change in employment status. *Ellerth* at 761. In summary judgment, this material fact must be viewed in the light most favorable to petitioner.

If this matter is allowed to stand, any plaintiff that provides testimony of an adverse action will be dismissed if an employer recites any type of contrary account of the action.

At summary judgement, any alleged adverse action that is acceptable by stated case law should be weighed by a jury and not the Court.

Review should be granted to prevent this irreversible harm.

B. Invoking the Dangerous Precedent that an Employee Does not Suffer an Adverse Action Even if Singled Out and Treated Differently Than Workers not in a Protected Class.

In addition to the first argument, this matter must be reviewed because the current standard of "adverse action" does not give justice to the many workers in a protected class that are not treated as equals but not able to allege discrimination due to a lack of change in pay and status.

Naviello's actions against plaintiff, in and of itself, has caused a change of the terms and conditions of employment to the petitioner. Even if it is not accepted that petitioner's loss of 204B status was an adverse action (which it is), the Supreme Court should examine this matter. The actions of Naviello significantly infringed upon plaintiff's job benefits and privileges that other non-minority, male workers enjoyed. Such infringements given to all other workers, but not to petitioner, include: working regularly scheduled hours, stability on her machine and working pre-approved out of schedule hours. Petitioner also had to endure the adverse actions of having her supplies stolen, being yelled and cursed at, harassed, demeaned and exploited. Petitioner alleges and provides evidence that these adverse actions against her were due to her protected status as an African American woman. However, since the actions do not conform to the explicit

"terms and conditions" as defined by *case law*, she is without a remedy. It is clear from the phrase "terms and conditions of employment", an adverse action should include inequitable treatment that the plaintiff is subjected to that non-protected employees are not. If this exemption is not granted, it gives employers the right to demean and defile protected employees at will as long as they do not infringe the pay status or promotional rank of the individual. This is against the basic philosophy of Title VII as all employees are to be treated in an equal manner. It should not stand and an exemption should be made to account for this adverse behavior.

Review should be granted to prevent this irreversible harm.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED SEPTEMBER 23, 2003

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 03-1087

CHERYL M. CARROLL,

Appellant,

v.

POSTMASTER GENERAL, *JOHN E. POTTER; U.S. POSTAL SERVICE; EUGENE NAVEILLO, IN THEIR PROFESSIONAL CAPACITY AND AS INDIVIDUALS,

* (Pursuant to F.R.A.P. 43(c))

On Appeal From the United States District Court
For the District of New Jersey
(D.C. No. 99-cv-05635)
District Judge: Honorable Alfred M. Wolin

Submitted Under Third Circuit LAR 34.1(a)
September 8, 2003
Before: BARRY, BECKER, and
GREENBERG, *Circuit Judges*

(Filed September 23, 2003)

Appendix A

OPINION OF THE COURT

BECKER, *Circuit Judge.*

This is an appeal by plaintiff Cheryl M. Carroll from the District Court's grant of summary judgment against her and in favor of the defendant Postmaster General of the United States. Carroll's suit brought under Title VII of the Civil Rights Act alleges that she had been subjected to a hostile work environment; disparate treatment based on her race and gender; and retaliation for prior complaints of alleged discrimination. The claim is based upon events which allegedly occurred as early as 1987 - over 15 years ago. However, the parties are fully familiar with the lengthy factual and procedural history, and we need not rescribe it here.

Having examined the lengthy record, we are satisfied that the able District Judge analyzed the case correctly in his opinion. We affirm largely for the reasons set forth in Judge Wolin's opinion. However, we add a number of comments.

First, Carroll's main example of adverse action is the loss of her 204B supervisor status, but this occurred more than a year after Mr. Naviello's alleged "come-ons" (which no one witnessed, and of which the EEO has no records), and the record shows that in the early 1990s, the Post Office "abandoned the practice of allowing any mail handlers to serve as a 204B." (A17.) Carroll alleges that she lost her 204B status in 1988, before the Post Office changed its policy. Even given that timing issue, the year of separation between the alleged harassment and the loss of 204B status precludes any inference of causality.

Second, and more generally, Carroll alleges that: (1) Naviello asked her out socially on three occasions in 1987; (2) Naviello completed her paperwork when she worked as a 204B; (3) Naviello watched her while she worked and followed her around on the work floor; (4) management moved her from her work area in 1990 and 1995; (5) her position behind the LSMs[1] and her work hours were changed in 1993; (6) she was "yelled at" for working outside her regularly scheduled hours in August 1998; and (7) Naviello rubbed his back up and down the wall in a "suggestive manner" on one occasion in 1999.

The Postmaster has set forth justifications for each of the relocations and changes in hours. For example, although Carroll alleges that she was moved to an undesirable time slot before a more junior person was moved, the Postmaster explains that the more junior person was not scheduled to start on the job for another month. As for being "yelled at," the explanation is that management simply wanted her to fill out a particular form, and there is evidence that others received similar treatment.

The main allegations are those involving Naviello. However, as the District Court concluded, only the most recent "suggestive rubbing" incident was timely reported to the EEO, and these three to four corroborated incidents over the course of 13 years hardly create the "continuing violation" needed to escape Title VII's 45-day time-bar.

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1. LSM is a letter sorting machine. Carroll's responsibilities included working behind an LSM and manually sorting mail.

Appendix A

Naviello was surely an objectionable person. But on the record as a whole, the District Court was plainly correct in granting summary judgment for the Postmaster. The judgment of the District Court will be affirmed.

TO THE CLERK:

Please file the foregoing opinion.

/s/ Edward R. Becker
Circuit Judge

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED DECEMBER 9, 2002

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Hon. Alfred M. Wolin

Civil Action No. 99-5635 (AMW)

CHERYL M. CARROLL,

Plaintiff,

v.

WILLIAM J. HENDERSON, POSTMASTER GENERAL, AND THE UNITED STATES POSTAL SERVICE

Defendants

OPINION

This matter is before the Court on the motion of defendants William J. Henderson, Postmaster General and The United States Postal Service for summary judgment pursuant to Fed. R. Civ. P. 56. This matter was decided on the written submissions pursuant to Federal Rules of Civil Procedure 78. For the reasons that follow, the application will be granted.

Appendix B

BACKGROUND

The Court looks at the following facts in the light most favorable to plaintiff, the non-moving party. Plaintiff, Cheryl M. Carroll ("Carroll" or "plaintiff") began her employment with the United States Postal Service ("USPS") as a mail handler in February 1987. In this action, plaintiff alleges violations of Title VII of the Civil Rights Act of 1964. Specifically, she claims that she has been subjected to a hostile work environment, disparate treatment based on her race and gender, and retaliation for prior complaints of alleged discrimination. Plaintiff seeks judgement against defendants and prays for relief in the form of compensatory and punitive damages, costs and attorneys' fees; an injunction against defendants and others who participated in the commission or omission of any aforesaid unlawful acts against her; to induce defendants to take such action as may be necessary to prevent future commission of any unlawful acts against her and any further relief that the Court may deem appropriate.

Carroll's allegations stem from her interactions with Eugene Naviello ("Naviello") who was the Superintendent/ Manager of Distribution Operations since Carroll began working for USPS in 1987. Although her department was under the supervision of Naviello, Naviello was not her immediate supervisor.[1] Carroll alleges that Naviello began sexually harassing her soon after she started working for USPS. Carroll's claim of hostile work environment sexual

1. Carroll's immediate supervisor from 1993-1994 was Dennis Hurley; from 1995 was Richard Johnson; and in 1998 was Mark Pavilcheck.

harassment, and gender and race based discrimination is determined on the following allegations of Naviello's conduct.

While she was serving an Acting Supervisor (a "204B")[2] in 1987, Naviello allegedly asked Carroll out socially, on three consecutive evenings. On each of those occasions, Carroll rejected the invitations. Naviello denies the allegation that he ever asked Carroll out socially and there were no witnesses who overheard the alleged invitations.

Carroll testified that immediately after Naviello asked her out socially, she contacted an EEO counselor to report the unwelcome invitations. She testified that she completed the necessary paperwork and spoke to a counselor in reference to the invitations. Furthermore, Carroll testified to having informed her union and co-workers of the incidents.

The EEO Computer Tracking System[3] however, has no record of any filings from plaintiff in 1987. The testimony of co-workers offered by plaintiff, stated that they heard rumors that Naviello asked plaintiff out socially, but were unable to recall when and from whom these rumors were heard.

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2. A 204B would serve as a supervisor in the event of a permanent supervisor's absence. This position required the employee to take on supervisory responsibilities. Furthermore, when serving as a 204B, an employee who usually earned level-four pay would receive an increase in pay to a level-fifteen.

3. The USPS uses an EEO Computer Tracking System which records any EEO activity that has been filed since 1978. Although hard copies of filings are routinely discarded after six years, the EEO Computer Tracking System retains the information electronically.

Appendix B

During 1987 through 1988, Carroll testified that Naviello allegedly would stare at her for long periods of time while she was working. Carroll further testified that, in an attempt to socialize with her, Naviello would complete the paperwork she was required to submit as a 2048. Additionally, Carroll testified that Naviello allegedly would follow her around the work floor "like a sick puppy", and that he would attempt to prevent her from having lunch alone or with friends so he could have lunch with her. Carroll testified that when she confronted Naviello regarding his behavior, he would tell her "'if you want it to stop, you know what to do' and glance at his private area."

Carroll does not elaborate on the circumstances around these incidents, nor does she provide exact dates or specific circumstances, her reactions or any subsequent actions of Naviello. Carroll, furthermore, does not offer the Court any certainty as to the frequency of the incidents other than saying the incidents occurred "all the time" or "constantly." Carroll has not provided the Court with any direct evidence of these alleged incidents, other than her vague testimony.

Carroll further testified that as a result of her discussion with an EEO counselor, Naviello refused to use her as a 204B. Nevertheless, although Carroll allegedly contacted the EEO in 1987, she continued to serve as a 2048 until the summer of 1988. Moreover, sometime in 1990, the USPS no longer allowed mail handlers to serve as 204Bs, thus, plaintiff, as well as all of the other mail handlers, were proscribed from any longer serving as a 204B.

Appendix B

Carroll testified that throughout 1989 and 1990, Naviello often moved her from her usual LSM[4] to another. Carroll was thus required to alleviate the overload from the new LSM and continue to work on her usual LSM when she returned to it. Plaintiff testified that she spoke to an EEO counselor and filed a complaint about being moved from one LSM to another, as well as about her claims of harassment by Naviello.

Plaintiff claims that the EEO counselor changed the wording of the complaint, which was eventually resolved in favor of Naviello. Neither plaintiff nor the EEO, however, has a copy of the complaint or any record of the decision. Moreover, the EEO Computer Tracking System has no files on record from plaintiff during that time period.

Due to advances in automation in the early 1990s, several mail handler jobs were eliminated and the schedules of many employees were changed. In 1993, Carroll was among those employees whose work hours were changed. Carroll contends that her schedule was changed because of her rejection of Naviello's romantic overtures and because she is African-American. She further testified that there were more-junior employees whose hours should have been changed rather than hers.

Carroll was contacted by EEO representative, Shirley Rivers ("Rivers"), in reference to her grievance about the

4. LSM refers to a letter-sorting machine. Carroll's responsibilities at USPS included working behind an LSM and manually sorting the mail.

schedule change. Carroll, thereafter, filed a complaint alleging race and gender harassment, discrimination and retaliation.

Although Carroll alleges to have filed a number of EEO complaints since 1987, the complaint initiated with the assistance of Rivers in 1993 is the first filing on record with the EEO Tracking System. The EEO Tracking System recorded that in 1993 Carroll initiated a claim to address her schedule change. However, the EEO Computer Tracking System does not reflect that plaintiff filed a formal complaint, rather only that she initiated a case by submitting a Precomplaint form. Without any further actions on the claim, the file was closed and Rivers sent Carroll a letter, dated May 19, 1994, which stated that as per Carroll's request, the file was being closed. Nevertheless, late in 1994, Carroll was scheduled to resume her original work hours.

In 1995, one of Carroll's co-workers took her work supplies and put extra work on her LSM. When management witnessed the coworker taking supplies from plaintiff's machine, the co-worker was reprimanded and a similar incident never occurred again. However, conflicts between the co-worker and Carroll remained. Carroll was moved from LSM #one to LSM #three to alleviate the tension between the co-workers. Carroll contends that a more junior employee, instead of her, should have been moved to a different LSM. Carroll claims that LSM #three was overloaded with work and the other LSMs were empty; thus she would work while Caucasian co-workers remained idle.

Appendix B

In May 1995, Carroll requested an appointment with an EEO counselor in connection with her assignment to LSM #three and the resultant heavier workload. Carroll alleged that the reassignment was discriminatory based upon her race and sex and retaliatory based upon her EEO contacts from 1989. In November 1995, Carroll filed a formal EEO Complaint of Discrimination, wherein she alleged that she was subjected to discrimination based upon her race, color and sex beginning on March 27, 1995 as well as retaliation for her prior EEO activity.

On January 17, 1996, USPS dismissed Carroll's EEO complaint reasoning that it failed to state a claim for discrimination. Carroll appealed the decision and the case was remanded to USPS for further proceedings. After a meeting with an EEO counselor, the union representative, her immediate supervisor and Naviello, Carroll voluntarily withdrew her complaint. Nevertheless, Carroll testified that she believed that her claim would remain active even if she withdrew the complaint. Carroll remained on LSM #three and the workload continued to be substantial. Carroll attempted to reopen the case but was told by the EEO counselor that the case was closed.

In August 1998, Naviello was informed that Carroll was working out of schedule without having submitted the requisite Form 3189. When Naviello confronted her, Carroll stated that the change in schedule was verbally granted by her immediate supervisor. Plaintiff alleges that Naviello raised his voice and the encounter was heated. She testified that there were Caucasian employees who were also working out of schedule who did not get reprimanded. As a result of

the confrontation, Carroll attended a meeting with her immediate supervisor, Naviello, the senior plant manager, the union representative and an intervention analyst to clarify what occurred and to ensure no future repetition of the problem.

Carroll, moreover, requested an appointment with an EEO counselor regarding the incident. In her Pre-Complaint Form, Carroll claimed the she was singled out because of discrimination based on her race, color and sex and that she was mentally harassed. She also claimed she was being retaliated against for past EEO contacts.

In January, 1999, plaintiff filed a formal EEO Complaint of Discrimination, wherein she alleged that she was subjected to discrimination based upon her race and sex, pertaining to the Form 3189 incident, as well as for retaliation for her prior EEO activity. On March, 1999, USPS issued its final agency decision, dismissing plaintiff's EEO complaint for failing to state a claim for discrimination or harassment. On September 2, 1999, the EEOC dismissed Carroll's appeal, affirming the USPS dismissal. On September 24, 1999, Carroll requested reconsideration from the EEOC, which was subsequently denied.

On or about December 2, 1999, Carroll filed the instant action against William Henderson, Postmaster General, the USPS, and Eugene Naviello. Carroll's complaint includes claims for discrimination, hostile work environment, sexual harassment and retaliation. Carroll subsequently amended her complaint to dismiss Mr. Naviello as a defendant in the case.

Carroll claims that the harassment against her has continued even after she filed the present suit. Specifically, she testified that Naviello required her to apologize to a co-worker that claimed Carroll cursed at him.[5] Finally, Carroll testified that Naviello slid against the wall, in an allegedly suggestive manner, while she was watching.

DISCUSSION

Lack of Subject Matter Jurisdiction as to USPS

Plaintiff bases her claim on Section 717 of Title VII of the Civil Rights Act of 1964. Title VII requires a plaintiff to sue a department head, not the governmental agency. 42 U.S.C. 2000e-16(c). In a claim against the USPS, the only proper defendant in a Title VII suit of employment harassment, discrimination and retaliation is the Postmaster General. *See Soto v. USPS*, 905 F.2d 537, 539 (1st Cir. 1990).

Plaintiff was required to name the Postmaster General, William J. Henderson as defendant in her claims against USPS. Plaintiff, indeed named the head of the department, however, she also named USPS as a defendant. Accordingly, the Court dismisses the amended complaint as to USPS for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1).

Summary Judgment Standard

Summary judgment shall be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

5. Plaintiff denies that she ever cursed at the co-worker.

genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Hersh v. Allen Prods. Co.*, 789 F.2d 230, 232 (3d Cir. 1986). When the non-moving party bears the burden of proof at trial, the moving party can satisfy its burden of production by "pointing out to the district court that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once the moving party has met its burden of showing there is an absence of a genuine issue of fact, the burden shifts to the non-moving party to "make a sufficient showing on an essential element of [its] case" to establish a factual dispute. *See id.* at 323. The nonmovant may not rest on mere allegations, but rather must provide specific facts evincing the material dispute. *See id.* at 322 n.3; Fed. R. Civ. P. 56(e).

When the non-moving party's evidence in opposition to a properly supported motion for summary judgment is merely "colorable" or "not significantly probative," the court may grant summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986). "[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249. Summary judgment may be granted only if no reasonable trier of fact could find for the non-moving party. *See id.*

Conversely, if a reasonable trier of fact could find for the non-moving party, the court must deny summary judgment. *See id.* Moreover, in making this determination, a court must draw all reasonable inferences in favor of the non-movant, *Meyer v. Riegel Prods. Corp.*, 720 F.2d 303,

307 n.2 (3d Cir. 1983), while keeping in mind that the non-movant may not "rest upon mere allegations, general denials, or . . . vague statements." *Quiroga v. Hasbro, Inc.*, 934 F.2d 497, 500 (3d Cir. 1991), *cert. denied*, 502 U.S. 940 (1991); Fed. R. Civ. P. 56(e). The summary judgment procedure enables a party "who believes there is no genuine issue as to a specific fact essential to the other side's case to demand at least one sworn averment of that fact before the lengthy process of litigation continues." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888-89 (1990).

In Title VII cases, impermissible discriminatory intent and proof of disparate treatment are often difficult to establish, thus, courts must view summary judgement with special caution. *Swindle v. Henderson*, 142 F.Supp.2d 625, 631 (D.N.J. 2001) (citing *Hastie v. Henderson*, 121 F.Supp.2d 72, 77 (D.D.C. 2000)). Nevertheless, considering the importance of eradicating workplace discrimination and sexual harassment, as well as of insuring the availability of Title VII remedies to truly aggrieved workers, a court faced with meritless sexual harassment claims should not hesitate to grant summary judgment in the defendant's favor: *Swingle*, 142 F.Supp.2d at 631.

HOSTILE WORK ENVIRONMENT SEXUAL HARASSMENT

Title VII provides a cause of action for persons forced to work in an environment where sexual harassment has created a hostile or abusive atmosphere. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 73 (1986). The requirements for establishing a claim of sexually hostile work

environment are: (1) the employee suffered intentional discrimination because of his/her sex; (2) the discrimination was pervasive and regular; (3) the discrimination detrimentally affected the plaintiff; and (4) the discrimination would detrimentally affect a reasonable person of the same sex in that position. *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 (3d Cir. 1990).

"[N]ot all workplace conduct that may be described as 'harassment' affects a 'term, condition, or privilege of employment." *Meritor*, 477 U.S. at 67. Thus, "objectionable conduct attributable to an employer is not always sufficient to alter an employee's terms, conditions, or privilege or employment and is thus not always sufficient to violate Title VII." *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1297 (3d Cir. 1997). Moreover, the court must determine whether the work environment is intimidating, hostile or offensive "only by looking at all the circumstances." *Harris v. Forklift Systems*, 510 U.S. 17, 24 (1993). These circumstances "may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id.* at 23.

Carroll bases her sexually hostile work environment claim on the following incidents: (1) that Naviello asked her out socially on three occasions in 1987; (2) that Naviello watched her and followed her on the work floor (3) that she was moved from her work area in 1990; (4) that her position and schedule were changed in 1993; (5) that she was again moved from her work area in 1995; (6) that she was reprimanded for working outside of her normal schedule in

1998; and that (7) she witnessed her supervisor leaning with his back against the wall in a "suggestive manner." After each incident wherein she was moved and reprimanded, Carroll claims to have confronted Naviello who allegedly stated "if you want it to stop, you know what to do" and glanced at his private area.

Taking all of plaintiffs statements as true, this Court finds it is unable to conclude that Carroll suffered hostile work environment sexual harassment. Moreover, Carroll is unable to show that the alleged actions of Naviello, even when viewed together, rise to the level of affecting her compensation, terms, conditions or privileges of employment. Carroll has worked for USPS for many years and in the span of over ten years she points to a handful of incidents to support her claim of hostile work environment. The events described by plaintiff occurred in intervals of two or three years and spanned many years of employment with the USPS. This Court finds that plaintiff's claims are not sufficiently pervasive and regular to be characterized as hostile work environment sexual harassment.

Furthermore, a *prima facie* showing of hostile work environment requires, a showing of "pervasive and regular" harassment, under both a subjective and objective standard. *Id.* Conduct that is "merely offensive," or which has the effect of making the employee's life at work merely unpleasant or uncomfortable, is, without more, not actionable. *Meritor*, 477 U.S. at 70.

"[O]ffhand comments and isolated incidents (unless extremely serious) will not amount to discriminatory changes

in the 'terms and conditions of employment." *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998). Although they may be unwelcome, three alleged social invitations from 1987 can not be considered regular and pervasive. Also, as a supervisor in Carroll's section, it is reasonable for Naviello to be watching her area to ensure the quality of the mail processing. Additionally, moving plaintiff from her usual work area and changing her work schedule due to operational need are common management decisions and in this instance, bear no nexus to sexual or hostile intention. The claim that Naviello followed plaintiff is vague and the Court is unable to decipher how it bears on plaintiff's claim. Furthermore, the incident wherein Naviello is leaning against a wall is equally vague, isolated and devoid of any context, thus, the Court finds it to be immaterial to plaintiff's claims.

The Supreme Court has "never held that workplace harassment even harassment between men and women is automatically discrimination because of sex merely because the words used have sexual content or connotations." *Oncale v. Sundower Offshore Servs.*, 523 U.S. 75, 80 (1998). The comment that Carroll alleges that Naviello made is not facially offensive and even coupled with his alleged glance is too vague, minor and infrequent to be considered the cornerstone of a plaintiff's Title VII sexual harassment hostile work environment claim. The Court finds that plaintiff fails to present a *prima facie* case of sexual harassment hostile work environment, thus, the Court grants defendant's motion for summary judgement.

Appendix B

EMPLOYMENT DISCRIMINATION BASED UPON RACE AND GENDER

A plaintiff's claims of discrimination based on race and gender are subject to the allocations of burdens of proof enunciated by the United States Supreme Court in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). The first step in the *McDonnell-Douglas* scheme is for plaintiff to establish a *prima facie* case of discrimination. *Id.* at 802. To establish a *prima facie* case of employment discrimination, plaintiff must prove: (1) she belongs to a protected class; (2) she was subject to an adverse employment action; and (3) such adverse action gives rise to an inference of discrimination. *Swingle*, 142 F.Supp.2d at 633 (citing *Brown v. Brody*, 199 F.3d 446, 452 (D.C. Cir. 1999)).

Carroll claims that her loss of 204B status is an adverse employment action which satisfies her *prima facie* case. She claims that as a result of losing the opportunity to work as a 204B, she lost the increase in wages and was unable to become a supervisor. However, the fact remains that Carroll continued to work as a 204B well after her alleged rejection of Naviello's social invitations and her subsequent contacts with the EEO counselors. Furthermore, in the early 1990s, contemporaneous to Carroll's claim of being wrongfully denied 204B status, the USPS abandoned the practice of allowing any mail handlers to serve as a 204B.

Carroll's *prima facie* case fails because she presented no evidence that she was ever subjected to an adverse employment action. Carroll was never fired, suspended, demoted, docked in pay, or denied a promotion for which

she applied, moreover, she testified that she was never even reprimanded in writing. Therefore, this Court finds that plaintiff's claim of employment discrimination is without merit and, thus, the Court grants defendant's motion for summary judgement.

UNLAWFUL RETALIATION

To state a *prima facie* claim of unlawful retaliation, a plaintiff must establish that (1) she engaged in an activity protected by Title VII; (2) she was subject to an adverse employment action after or contemporaneous with the activity; and (3) there was a causal connection between her participation in the protected activity and the adverse employment action. *Robinson*, 120 F.3d at 1299-1300. Retaliatory conduct, other than discharging an employee or refusing to rehire her, is only actionable under Title VII if it alters the employee's compensation, terms, conditions, or privileges of employment, deprives her of her employment opportunities, or adversely affects her status as an employee. *Id.* at 1300.

As outlined above, Carroll is unable to present this Court with any incident, or culmination of incidents which qualify as an adverse employment action. The Court finds that the plaintiff does not satisfy the requirements of the *Robinson* analysis because she could not claim that she suffered an adverse employment action. In addition, when Carroll filed her claims of retaliation in administrative proceedings, the EEOC found that she failed to state a claim, or Carroll withdrew the complaint before a final determination. For the

foregoing reasons, the Court finds that plaintiff was unable to present a *prima facie* case of unlawful retaliation, thus, the Court grants defendant's motion for summary judgement.

CONCLUSION

Therefore, the Court grants defendant's motion to dismiss the United States Postal Service for lack of subject matter jurisdiction. The Court further grants defendant's motion for summary judgment in reference to plaintiff's claims of hostile work environment sexual harassment, employment discrimination based on race and gender, and unlawful retaliation.

An appropriate order is attached.

Dated: December 9, 2002

s/ Alfred M. Wolin
Alfred M. Wolin, U.S.D.J.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED DECEMBER 10, 2003

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NO. 03-1087

CHERYL M. CARROLL,

Appellant

v.

POSTMASTER GENERAL OF THE UNITED STATES

Present: BARRY, BECKER and GREENBERG,
Circuit Judges.

SUR PETITION FOR PANEL REHEARING

The petition for rehearing filed by appellant, having been submitted to the judges who participated in the decision of this Court and no judge who concurred in the decision having asked for rehearing, the petition for panel rehearing is DENIED.

BY THE COURT:

/s/ Edward R. Becker
Circuit Judge

DATED: December 10, 2003